# F I S C A L  I M P A C T  R E P O R T

**SPONSOR** HAWC **ORIGINAL DATE** 2/19/15 **LAST UPDATED** **HB** 235/HAWCS

**SHORT TITLE** Use of Public Water and Landowner Protection **SB**

**ANALYST** Armstrong

## APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|
| **FY15** | **FY16** | | |
| | NFI | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates SB 226

## SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (AGO)
Office of the State Engineer (OSE)

Responses Not Received From
Department of Game and Fish (DGF)

## SUMMARY

Synopsis of House Agriculture, Water and Wildlife Committee Substitute

The House House Agriculture, Water and Wildlife Committee's substitute House Bill 235 amends existing statute regarding hunting and fishing on private property to prohibit walking or wading onto private property by use of public waters without the landowner's express written consent. The substitute bill also creates a new section of statute granting the State Game Commission (SGC) authority to determine streambed ownership based on whether a stream is a "navigable water." Additionally, the bill provides a new civil cause of action for injunctive relief against individuals entering or remaining on private property for recreational without the landowner's permission, establishes a presumption that water on private land is non-navigable, and exempts the use of water by watercraft from the bill's restrictions.

## FISCAL IMPLICATIONS

No fiscal impact.

## SIGNIFICANT ISSUES

Although statute and DGF rules prohibit fishing *on private property* without the landowner's written permission when the land is properly posted with signs, a 2014 Attorney General Opinion stated that existing laws and regulations do not directly address the question of the public's right to fish *in* streams crossing private land. The opinion relied on the fact that New Mexico law declares that unappropriated water in natural streams belongs to the public and caselaw holding that owners of land bordering public waters have no right to exclude the public from recreating thereon.

While sportsmen supported the opinion allowing individuals to wade through and fish in water flowing through private land, some landowners and livestock and hunting and fishing outfitter organizations claimed it limited private property owners' right to benefit from investments made to improve riparian habitat and fishing opportunities.

According to AGO analysis:

> Section 1(C), pg. 2, ln. 15-16: "Notwithstanding the provisions of Sections 72-4-15 and 72-4-17 or any other provisions of law…" The two specific sections mentioned govern the water rights, appropriations of water, and adjudications of those rights by the Office of the State Engineer (OSE). It is unclear exactly what effect this would have on the authority of the OSE at his time, but it appears that there could be some effect and this potentially undermines or erodes the grant of power provided to the OSE.
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> Section 2(A), pg. 3, ln. 6-8: "Determination of streambed ownership based on whether water on private property is navigable water…." The Desert Land Act of 1877, 43 U.S.C. §§ 321–339 (2014), severed the ownership of the water from ownership of the land over which it flowed before the creation of the state of New Mexico. As a result, a determination by the SGC of public ownership of the streambed based on the navigability of the water would potentially effect a governmental taking, depending on the facts and circumstances. HB 235 does not provide for just compensation. The lack of just compensation for any taking that occurs as a result of such a determination could render the taking unconstitutional.
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> Section 2(A), pg. 3, ln. 20-22: It is unclear what the presumption (that water on private land is non-navigable) will do to access of state waters currently in use. It appears that the SGC would have to officially determine them to be navigable, and therefore, any current use of them would violate the law unless and until SGC makes such a determination, regardless of whether they are currently or have historically been used. This could potentially disrupt the activities of the state and create, at least an initially, a backlog of determination cases, which the SGC would be required to process.
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> Section 2(B), pg. 4, ln. 4-12: Causes of action and injunctions already exist for trespass. HB 235 allows for an additional and redundant measure, providing that a landowner could bring an action under both trespass and this new cause of action simultaneously, and thereby provides multiple punishments for unified conduct. As a result, any person in violation of this could be criminally liable for trespass, civilly liable for trespass, and civilly liable under Section 17-4-7, for the same activity. In addition, it does not appear to make enforcement no easier or more likely than those remedies currently available.

> Section 2(E), pg. 5, ln. 1-3: This section admonishes the public to "remove any refuse or tangible personal property," but provides no penalty, and appoints no agency or official to enforce the provision. As a result, it is unclear whether this provision allows for some type of penalty or whether it is superfluous.

OSE's analysis echos AGO's concern that the references to Sections 72-4-15 and 72-4-17 are unnecessary and could lead to confusion and litigation regarding OSE's authority to enter private property in performing the agency's statutory duties.

Finally, it is unclear what qualifications or expertise SGC has to make the determination of whether waters are navigable. The Interstate Stream Commission may be better suited to make this determination.

**TECHNICAL ISSUES**

AGO's analysis offered the following suggestions:

> Section 2, pg. 2, ln. 25: "A new section of Chapter 17 NMSA 1978 is…," suggest clarifying whether this is a new article to be included in Chapter 17 or a new section of Chapter 17, Article 1 (which deals with the creation and grant of authority to the SGC).
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> Section 2(F)(1), p. 5, ln. 5-6, suggest consider deleting this subsection regarding the definition for "department" because the term is not used in the bill as drafted. Note this would also require the renumbering of Subsection (F).
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> Section 2(F)(2), p. 5, ln. 13-15, suggest clarifying, as written it is unclear whether the bill intends that the request to leave by "the owner or a person authorized to act…" renders land "private property to which access is restricted" to all persons or solely to the person asked to leave the premises.
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> Section 2(F)(5), p. 5, ln. 23-24, suggest considering removing or clarifying the definition for "public water," because this definition appears to refer only to unappropriated water. "Public water" can be a term of art used in water law generally, it is unclear what impact this definition would have on the use of the term public water in reference to fully appropriated basins.

On the final point raised by AGO regarding the bill's definition of "public waters," Section 72-1-1 states that all natural waters flowing in streams and watercourses, whether perennial, or torrential, within the limits of the state of New Mexico, belong to the public. OSE notes this existing language conflicts with the bill's definition of "public waters."

JA/bb/je